

WO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Caremark LLC, et al.,

Plaintiffs,

No. CV-24-00082-PHX-ROS
No. CV-24-00092-PHX-ROS

V.

Cherokee Nation, et al.,

Defendants.

and

Plaintiffs.

V

Cherokee Nation, et al.,

Defendants

ORDER

The Cherokee Nation and the Muscogee (Creek) Nation own and operate pharmacies that provide medication and services to members of those nations. Caremark and its affiliated companies entered into agreements with the pharmacies under which Caremark agreed to provide pharmacy benefit management services. Those agreements included language requiring the parties arbitrate any disputes. In 2023, the Nations filed separate suits against Caremark in the Eastern District of Oklahoma, alleging Caremark improperly denied and underpaid claims made by the pharmacies. In 2024, Caremark filed the present suits, seeking orders compelling the parties to resolve their disputes via

1 arbitration. Other judges in the District of Arizona have compelled arbitration in almost
 2 identical situations and the Ninth Circuit affirmed one of those orders. The Ninth Circuit's
 3 ruling establishes the petitions to compel arbitration in these cases must be granted.

4 **BACKGROUND¹**

5 The Cherokee Nation and the Muscogee (Creek) Nation operate pharmacies where
 6 members of the nations can obtain prescriptions and other services. Each nation has a
 7 contractual relationship with Caremark for Caremark to provide services to the pharmacies.
 8 As relevant here, Caremark's services relate to the pharmacies being paid for prescriptions
 9 and services. The contract between each nation and Caremark is found in "two key
 10 documents: the Provider Agreement and the Provider Manual." *Caremark, LLC v.*
 11 *Chickasaw Nation*, 43 F.4th 1021, 1025 (9th Cir. 2022). The Provider Agreement is a short
 12 document that incorporates the Provider Manual. *Id.* The Provider Manual is a lengthy
 13 document that "governs all aspects of a pharmacy's relationship with Caremark, including
 14 the process for submitting pharmacy claims." (Doc. 12 at 10). The Provider Manual
 15 contains the arbitration provision at issue in these cases.

16 Section 15.09 of the Provider Manual is titled "Arbitration." That section provides,
 17 in relevant part,

18 Any and all disputes between Provider and Caremark . . .
 19 including, but not limited to, disputes in connection with,
 20 arising out of, or relating in any way to, the Provider
 21 Agreement or to Provider's participation in one or more
 22 Caremark networks or exclusion from any Caremark networks,
 23 will be exclusively settled by arbitration. This arbitration
 24 provision applies to any dispute arising from events that
 25 occurred before, on, or after the effective date of this Provider
 Manual. . . . Unless otherwise agreed to in writing by the
 parties, the arbitration shall be administered by the American
 Arbitration Association ("AAA") pursuant to the then
 applicable AAA Commercial Arbitration Rules and Mediation
 Procedures including the rule governing Emergency Measures
 of Protection (available from the AAA). . . .

26 (Doc. 8-18 at 100). All arbitrations under this provision must occur in Scottsdale, Arizona.

27 The same section of the Provider Manual requiring arbitration also contains what is

28 ¹ The citations to the record are from CV-24-82 but the record in CV-24-92 contains the same documents.

1 known as a “delegation clause.” A “delegation clause” is “a clause requiring the arbitrator,
 2 rather than courts, to resolve threshold issues about the scope and enforceability of the
 3 arbitration provision.” *Caremark*, 43 F.4th at 1026. The Provider Manual’s delegation
 4 clause states,

5 The arbitrator(s) shall have exclusive authority to resolve any
 6 dispute relating to the interpretation, applicability,
 7 enforceability, or formation of the agreement to arbitrate
 including, but not limited to, any claim that all or part of the
 agreement to arbitrate is void or voidable for any reason.

8 (Doc. 8-18 at 100).

9 The Nations and Caremark operated under versions of the Provider Agreement and
 10 Provider Manual for years and the contractual relationships appear to be ongoing. On
 11 August 3, 2023, the Nations filed separate suits against Caremark in the District Court for
 12 the Eastern District of Oklahoma. The complaints in those suits explain each nation
 13 operates numerous pharmacies dispensing prescriptions and providing other services to
 14 members of the Nations. Pursuant to federal law, the members “receive health care
 15 (including pharmacy services) at [Nations’] facilities at no charge.” (Doc. 1-1 at 5). To
 16 “recoup the costs of covered services,” federal law grants the Nations the right to recover
 17 some of the costs “from any applicable insurance coverage the [Nation member] may
 18 have.” (Doc. 1-1 at 5). In other words, if a member of the Nations has private health
 19 insurance, and that member receives a prescription at a facility operated by a Nation, the
 20 member will not pay the Nation for that prescription, but the Nation has a statutory right to
 21 seek payment from the member’s health insurer. (Doc. 1-3 at 30). The statute granting
 22 Nations this entitlement is referred to as the “Recovery Act.” 25 U.S.C. § 1621e.
 23

24 The Recovery Act provides a Nation “may enforce the right of recovery” provided
 25 by the statute by “instituting a separate civil action.” 25 U.S.C. § 1621e(e)(1). The
 26 Recovery Act also provides “no provision of any contract . . . shall prevent or hinder the
 27 right of recovery.” 25 U.S.C. § 1621e(c). According to the Nations, the language of the
 28 Recovery Act grants them an entitlement to file lawsuits and no contractual provision, such
 as an arbitration provision, can remove that entitlement.

1 A few months after the Nations filed their complaints in Oklahoma, counsel for
2 Caremark sent letters to the Nations requesting the parties engage in the “pre-arbitration
3 dispute-resolution process” required under the parties’ contracts. (Doc. 1-2 at 1). The
4 Nations responded with letters stating the contractual “dispute resolution provisions,”
5 including the arbitration requirement, were not enforceable. (Doc. 1-3 at 2). Caremark
6 then filed two separate petitions to compel arbitration in this District. The only relevant
7 difference between the two petitions is the petition in CV-24-82 involves the Cherokee
8 Nation and its pharmacies while the petition in CV-24-92 involves the Muscogee (Creek)
9 Nation and its pharmacies. Caremark filed the petitions in Arizona because the arbitration
10 provisions require all arbitrations occur in Scottsdale. The Nations responded to the
11 petitions by arguing the Court should wait for the Eastern District of Oklahoma to act in
12 the suits pending in that district. (Doc. 1, 18). The Nations make a variety of other
13 arguments against compelling arbitration, such as the language of the Recovery Act renders
14 the arbitration provisions unenforceable.

The Cherokee Nation and Muscogee (Creek) Nation are not the first nations to file suits against Caremark alleging violations of the Recovery Act. In 2020, the Chickasaw Nation sued Caremark in the Eastern District of Oklahoma alleging violations of the Recovery Act. In 2021, the Choctaw Nation filed a similar suit, also in the Eastern District of Oklahoma. Those cases prompted Caremark to file separate petitions to compel arbitration in the District of Arizona. The District of Arizona judges assigned those petitions issued orders compelling arbitration. In 2022, the Ninth Circuit affirmed the order compelling the Chickasaw Nation to proceed to arbitration. The order compelling the Choctaw Nation to proceed to arbitration was appealed but no decision has been issued. The Ninth Circuit’s opinion addressing the Chickasaw Nation provides sufficient guidance such that there is no need to await a result in the Choctaw Nation appeal before resolving the current petitions.

ANALYSIS

28 Most of the arguments presented by the Nations were considered and rejected by

1 the Ninth Circuit in *Caremark v. Chickasaw Nation*, 43 F.4th 1021 (9th Cir. 2022). The
 2 facts and governing documents in that case were effectively the same as the facts and
 3 documents in the current cases. In seeking reversal of the order compelling arbitration, the
 4 Chickasaw Nation offered the Ninth Circuit “two reasons why its Recovery Act claims
 5 [were] not arbitrable.” *Id.* at 1028. First, the Chickasaw Nation claimed there was no
 6 indication it had “clearly and unequivocally waived its tribal sovereign immunity.” *Id.*
 7 Second, the nation argued “the Recovery Act itself precludes the enforcement of any
 8 agreement to arbitrate.” *Id.* The Ninth Circuit rejected both reasons but, before doing so,
 9 the Ninth Circuit provided the framework courts must apply when resolving contested
 10 petitions to compel arbitration.

11 The first step when ruling on a petition to compel arbitration is to “resolve any
 12 challenge that an agreement to arbitrate was never formed, even in the presence of a
 13 delegation clause.” *Id.* at 1030. If an agreement was formed, “a court must . . . resolve
 14 any challenge directed specifically to the enforceability of the delegation clause before
 15 compelling arbitration of any remaining gateway issues of arbitrability.” *Id.* If an
 16 arbitration agreement was formed, and there is no valid challenge specifically to the
 17 delegation clause, “all arguments going to the scope or enforceability of the arbitration
 18 provision are for the arbitrator to decide in the first instance.” *Id.*

19 The Ninth Circuit concluded the Chickasaw Nation and Caremark had an
 20 agreement. Based on “the hundreds of thousands of claims the [Chickasaw] Nation has
 21 submitted to Caremark over the last several years . . . the Nation [could not] plausibly deny
 22 that it formed contracts with Caremark.” *Id.* at 1031. It was undisputed those contracts
 23 contained “arbitration provisions with delegation clauses.” *Id.*

24 Given the indisputable formation of agreements containing arbitration provisions
 25 with delegation clauses, the Ninth Circuit turned to whether the Chickasaw Nation was
 26 making any challenge “directed specifically to the enforceability of the delegation clause.”
 27 *Id.* at 1030. The Ninth Circuit recognized the Chickasaw Nation was arguing the language
 28 of the Recovery Act meant compelling arbitration would be improper. But the Ninth

1 Circuit concluded “[t]he Nation’s theory that the Recovery Act displaces the arbitration
 2 provisions . . . does not impugn the validity of the delegation clauses specifically.” *Id.* at
 3 1033. Instead, the argument that the language of the Recovery Act prohibits arbitration
 4 was “a challenge to the enforceability of the arbitration provisions as a whole.” *Id.*
 5 Because the Chickasaw Nation’s argument based on the Recovery Act was not a “challenge
 6 directed specifically to the enforceability of the delegation clause,” the parties had to
 7 proceed to arbitration where the arbitrator would resolve “any challenge to the validity of
 8 the [arbitration agreement] as a whole.” *Id.* at 1033.

9 Despite the reasoning in *Chickasaw Nation* that the Recovery Act did not preclude
 10 sending that case to arbitration, the Nations in the current cases make an almost identical
 11 argument.² The Nations’ current argument, however, appears to recognize the need to
 12 focus on the delegation clause. Accordingly, the Nations argue “the existence of a
 13 delegation clause cannot override the express will of Congress in precluding any
 14 contractual provision that ‘prevents or hinders’ the Nation[s]’ rights under the Recovery
 15 Act, including the right to maintain a civil action.” (Doc. 18 at 8-9). This argument relies
 16 on giving the terms in the Recovery Act very specific meanings. Again, that statute grants
 17 the Nations a statutory right to “enforce the right of recovery . . . by . . . instituting a separate
 18 civil action.” 25 U.S.C. § 1621e(e)(1). The Recovery Act further provides “no provision
 19 of any contract . . . shall prevent or hinder the right of recovery of . . . an Indian tribe.” 25
 20 U.S.C. § 1621e(d). The Nations interpret this language to mean the Recovery Act
 21 guarantees them the right to file “civil actions” in district court and any contractual
 22 provision preventing or hindering that right, such as the delegation clause, is not

23 ² The Nations make a preliminary argument that Caremark should have filed motions to
 24 compel arbitration in the pending Eastern District of Oklahoma cases. (Doc. 18 at 8). The
 25 Nations go so far as to argue Caremark has “no legitimate reason for filing [its] Petition[s]
 26 in this Court.” (Doc. 18 at 8). The Nations already know the precise reason Caremark
 27 filed the petitions to compel in the District of Arizona. As mentioned in *Chickasaw Nation*,
 28 the Tenth Circuit law binding on the Eastern District of Oklahoma prohibits district courts
 from compelling arbitration outside of their districts. 43 F.4th at 1028 n.5. That is, “where
 the parties agreed to arbitrate in a particular forum only a district court in that forum has
 authority to compel arbitration.” *Ansari v. Qwest Commc’ns Corp.*, 414 F.3d 1214, 1219–
 20 (10th Cir. 2005). Based on that rule, Caremark could not file motions to compel
 arbitration in the pending Eastern District of Oklahoma cases because that court cannot
 compel arbitration in Arizona.

1 enforceable.

2 Because the Nations' argument under the Recovery Act is specifically aimed at the
 3 enforceability of the delegation clause, the Court must resolve the issue. *Chickasaw*
 4 *Nation*, 43 F.4th at 1029. Fortunately, the result is straightforward. Courts must "enforce
 5 agreements to arbitrate according to their terms" unless the Federal Arbitration Act
 6 ("FAA") "has been "overridden by a contrary congressional command." *CompuCredit*
 7 *Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). A party arguing Congress intended to
 8 override the FAA "faces a stout uphill climb." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510
 9 (2018). The intention to do so must be "must be clear and manifest." *Id.* The language of
 10 the Recovery Act is not sufficiently clear to override application FAA.

11 Congress "knows how to override the [FAA] when it wishes—by explaining, for
 12 example, that, '[n]otwithstanding any other provision of law, . . arbitration may be used .
 13 . . only if' certain conditions are met; or that '[n]o predispute arbitration agreement shall
 14 be valid or enforceable' in other circumstances; or that requiring a party to arbitrate is
 15 'unlawful' in other circumstances yet." *Epic Sys.*, 584 U.S. at 514 (statutory citations
 16 omitted). The language of the Recovery Act, however, does not explicitly reference
 17 arbitration or the FAA. Instead, the language of the Recovery Act is like other vague
 18 statutory language that has been found insufficiently clear.

19 In 1991 the Supreme Court addressed whether the Age Discrimination in
 20 Employment Act of 1967 ("ADEA") contained sufficiently clear language to override the
 21 FAA such that agreements requiring arbitration of claims brought under the ADEA could
 22 not be enforced. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991). The
 23 ADEA "read, in part: "Any person aggrieved may bring a civil action in any court of
 24 competent jurisdiction for such legal or equitable relief as will effectuate the purposes of
 25 this chapter." *CompuCredit*, 565 U.S. at 101 (quoting 29 U.S.C. § 626(c)). The Supreme
 26 Court concluded this language allowing an individual to bring a "civil action" in a "court
 27 of competent jurisdiction" was not a sufficiently clear indication that Congress wished to
 28 override the FAA. *Gilmer*, 500 U.S. at 29.

1 Similarly, in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), the statutory
 2 provision at issue included “repeated use of the terms ‘action,’ ‘class action,’ and ‘court.’”
 3 *Id.* at 100. The party resisting arbitration in that case argued those terms “call to mind a
 4 judicial proceeding” such that any agreement to arbitrate was not enforceable. *Id.* The
 5 Supreme Court disagreed, reasoning “[i]t is utterly commonplace for statutes that create
 6 civil causes of action to describe the details of those causes of action, including the relief
 7 available, in the context of a court suit.” *Id.* Merely using terms often associated with
 8 proceedings in court is not “sufficient to establish the contrary congressional command
 9 overriding the FAA.” *Id.*

10 Here, the Recovery Act prohibits any contract from hindering a Nation from
 11 “instituting a separate civil action.” 25 U.S.C. § 1621e(e)(1). That language falls well
 12 short of the demanding standard to override the FAA. In fact, the language of the Recovery
 13 Act is less indicative of such an intent than the language of the ADEA entitling a plaintiff
 14 to file “a civil action in any court.” *CompuCredit*, 565 U.S. at 101 (quoting 29 U.S.C. §
 15 626(c)). The Recovery Act does not preclude enforcement of the delegation clause.

16 The Nations make two additional arguments against compelling arbitration. The
 17 first argument was rejected in *Chickasaw Nation* and the second argument was rejected in
 18 cases prior to *Chickasaw Nation*. First, the Nations argue they cannot be forced to arbitrate
 19 their disputes because they did not waive their sovereign immunity. (Doc. 18 at 12). The
 20 Ninth Circuit rejected this argument. *Chickasaw*, 43 F.4th at 1032-33. According to the
 21 Ninth Circuit, “a tribal organization might agree to arbitrate any disputes for which it has
 22 waived sovereign immunity but still reserve its ability to choose whether to waive
 23 immunity in any given case.” *Id.* at 1032. It would be inappropriate for a court “to resolve
 24 whether there has been a waiver of tribal immunity for particular claims for which
 25 arbitration is sought before determining whether an arbitration agreement exists at all.” *Id.*
 26 at 1033. This language appears to mean that “[w]hen an arbitration agreement contains a
 27 delegation clause . . . a court need not resolve any sovereign-immunity implications but,
 28 instead, must only decide whether an arbitral agreement exists and, if so, then delegate to

1 the arbiter gateway questions of arbitrability (including whether an Indian tribe waived
 2 sovereign immunity).” *Sovereign immunity—Effect of arbitration on sovereign immunity*,
 3 Commercial Arbitration § 40:81. The Nations are free to make their sovereign immunity
 4 argument in the arbitrations.

5 The Nations’ final argument is arbitration cannot be required because the parties’
 6 agreement is “unconscionable.” This argument is not aimed specifically at the delegation
 7 clause. The Ninth Circuit has long held that when there is a delegation clause, a general
 8 argument that the entire contract is unconscionable is for an arbitrator to resolve. *See*
 9 *Brennan v. Opus Bank*, 796 F.3d 1125, 1133 (9th Cir. 2015) (noting a party seeking to
 10 avoid arbitration must argue the unconscionability of the delegation clause itself and not
 11 the unconscionability of the arbitration agreement as a whole). Therefore, the Nations’
 12 unconscionability argument must be presented to the arbitrator.

13 Consistent with *Chickasaw Nation*, the Court must compel arbitration. Current
 14 Ninth Circuit law would allow the Court to compel arbitration and dismiss these suits but
 15 the Supreme Court is considering whether the language of the FAA allows for dismissal in
 16 these circumstances. *Forrest v. Spizzirri*, 62 F.4th 1201, 1204 (9th Cir. 2023), *cert. granted*
 17 *sub nom. Smith v. Spizzirri*, 144 S. Ct. 680 (2024). The parties will be required to file a
 18 joint statement indicating if the Court should stay or dismiss these cases.

19 Accordingly,

20 **IT IS ORDERED** the Petition to Compel (Doc. 12) in CV-24-82 and the Petition
 21 to Compel (Doc. 12) in CV-24-92 are **GRANTED**.

22 **IT IS FURTHER ORDERED** the Clerk of Court shall docket this Order in CV-
 23 24-82 and CV-24-92.

24 ...

25 ...

26 ...

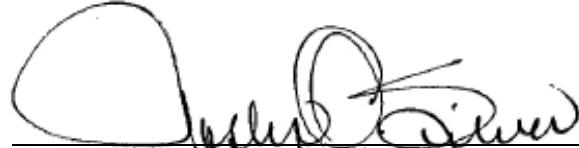
27 ...

28 ...

1 **IT IS FURTHER ORDERED** no later than **May 15, 2024**, the parties shall file a
2 joint statement in CV-24-82 stating whether the Court should stay or dismiss these actions.

3 Dated this 8th day of May, 2024.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Honorable Roslyn O. Silver
Senior United States District Judge